Comments on the Initial Findings and Draft Recommendations of the Task Forces on Updating and Improving The National Environmental Policy Act

prepared by
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The Honorable Cathy McMorris
United States House of Representatives
Committee on Resources
Chairwoman
Task Forces on Improving and Updating the National Environmental Policy Act
1334 Longworth House Office Building
Washington, DC 20515

The Honorable Tom Udall
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Ranking Member
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Dear Chairwoman McMorris,

The American Road and Transportation Builders Association (ARTBA) is pleased to offer comments on the December 21, 2005 Initial Findings and Draft Recommendations of the Task Forces on Improving and Updating the National Environmental Policy Act (NEPA).

ARTBA, whose eight membership divisions and more than 5,000 members nationwide, represent all sectors—public and private—of the U.S. transportation design and construction industry. ARTBA has provided the industry's consensus policy views before Congress, the executive branch, and the federal judiciary for 103 years. The transportation design and construction industry ARTBA represents generates $200 billion annually to the nation's Gross Domestic Product and sustains the employment of more than 2.5 million Americans.

ARTBA shares the task forces' goal of protecting the environment and minimizing the impacts of development. ARTBA also supports NEPA and realizes that it is an integral component of the transportation planning process.

ARTBA celebrates the commitment of the transportation construction industry to the environment every year when we hand out the association's Globe Awards to those transportation construction professionals, firms and public agencies that do an outstanding job in protecting and/or enhancing the natural environment in the planning,

design and construction of U.S. transportation infrastructure projects. Many, if not all of these projects would not have been so recognized were it not for the NEPA process.

ARTBA is also proud to have worked with the task forces throughout the seven month period when they gathered information on NEPA from areas across the United States. ARTBA attended and participated in multiple field hearing s and presented both oral and written testimony on two separate occasions. Now that the hearings have been concluded and the Initial Findings and Draft Report has been completed, ARTBA respectfully offers comments on each of the recommendations offered by the Task Force.

Recommendation 1.1 – Amend NEPA to define "major federal action." Clarifying the definition of "major federal action" (and other undefined terms within NEPA) will be helpful in reducing opportunities for litigation. Defining what constitutes a "major federal action" would properly recognize that there is a difference in the scope of activities undertaken by the government, and some do not warrant triggering the entire NEPA process. In the area of transportation construction, a definition of "major federal action" would clarify that, for NEPA purposes, routine repairs to existing roadways should not be treated in the same manner as construction of a new highway.

Recommendation 1.2 – Amend NEPA to add mandatory timelines for the completion of NEPA documents. Providing set time limits for the completion of Environmental Impact Statements (EISs) and Environmental Assessments (EAs) would go a long way towards reducing the delay inherent in the current NEPA review process. The current level of delay in the NEPA process associated with the completion of EISs and EAs continues to grow and needs to be addressed. The Task Force should note that delays are also experienced in the Categorical Exclusion (CE) process. Recommendation 2.2 should also include a deadline for completion of CE reviews. Four months, at most should be sufficient for the completion of a CE review.

Illustrating that delays associated with EISs, EAs and CEs have continued to grow, a recent study by FHWA found the time required to process environmental documents for large transportation projects has doubled over the past two decades. In the 1970s, the average time for completion of an EIS was 2.2 years. Former U.S. DOT Assistant Secretary for Policy Emil Frankel recently reported that from 1999-2001 the median time for completing an EIS was 4.4 years. If federal Clean Water Act section 404 wetland permit issues or section 4(f) of the Department of Transportation Act of 1966 (Section 4(f)) historic preservation or parkland avoidance issues come into play, the average time period grows by an additional two years, on average.

However, delays in the transportation project environmental review and approval process are not only limited to large projects. While according to FHWA three percent of federally funded transportation improvement projects require an EIS, the remaining 97 percent require an EA, (6.5 percent) or CE (90.6 percent). A recent report conducted by the National Cooperative Highway Research Program (NCHRP) stated:

> "[D]elays in completing [EA and CE] reviews are encountered frequently despite the minimal environmental impacts associated with such projects. Even if such project-level delays are individually small, their cumulative impact may be significant because most transportation projects are processed as CEs or EAs."

According to the report, 63 percent of all state DOTs responding to the survey reported environmental process delays with preparation of CEs and 81 percent reported similar delays involving EAs. These delays triple average environmental review times for CEs — from about eight months to just under two years — and have more than doubled review times for EAs, from under 1.5 years to about 3.5 years. The most common reason for these delays: section 4(f) requirements (66 percent); section 106 of the National Historic Preservation Act (NHPA) (61 percent); and section 404 of the Clean Water Act (53 percent). These numbers are consistent with a survey ARTBA conducted in 2001 of 49 state DOTs on delays in the environmental review process.

ARTBA recognizes that a uniform deadline may not work for every project. In setting deadlines for EISs, EAs or CEs, discussions involving the lead agency and project sponsor should take place in order to determine a realistic deadline for the project. Any changes to NEPA as a result of this recommendation should allow for project-specific flexibility in the setting of deadlines.

Recommendation 1.3 – Amend NEPA to create unambiguous criteria for the use of CEs, EAs and EISs. ARTBA strongly supports this recommendation and is particularly supportive of the aspect of erring in favor of the CE review process where environmental impacts are clearly minimal unless there is "compelling" evidence warranting a different course of action. The difference between an EIS and an EA is literally a matter of years. In order to reduce delay in the NEPA process, project planners should know when it is appropriate to use an EA instead of an EIS or, more preferable, a CE instead of an EA. Creation of specific criteria would allow planners to know what type of review is most appropriate for their project and would also reduce the threat of litigation by groups intent on delaying projects by pressing for a more comprehensive review regardless of whether or not it is needed.

Recommendation 1.4 – Amend NEPA to address supplemental NEPA documents. ARTBA strongly supports this recommendation. Establishing firm criteria as to when supplemental NEPA documents are warranted would provide a much needed sense of stability to the NEPA process. Currently, decisions regarding supplemental NEPA documents are made on a case by case (or, more accurately court by court) basis. Project opponents routinely use the ability to request supplemental documents as a method for delaying transportation projects.

In both Task Force field hearings where ARTBA testified, we drew attention to this problem by highlighting the litigation surrounding a highway widening project involving U.S. 95 in Las Vegas, Nevada. In that matter, the Sierra Club was able to obtain an injunction from a federal court pending an argument over a request for a supplemental EIS. This supplemental EIS was requested on account of an air quality modeling study

done outside of Los Angeles, California (not Las Vegas, Nevada). The court found this study sufficient justification to explore the possibility of requiring a supplemental EIS despite the fact that hundreds of air quality studies had been considered during the original EIS and that the original "final" EIS had been issued and approved two years earlier.

The establishment of clear guidelines as to when supplemental NEPA documentation is warranted will reduce unnecessary project delay and result in less litigation occurring at the later stages of project development. It will also give planners the predictability necessary to fully address serious issues that require supplemental documentation when and if such issues do arise by allowing them to devote full attention to those issues rather than wonder whether or not the do warrant supplemental review or are being raised solely to delay the project.

Recommendation 2.1 – Direct CEQ to prepare regulations giving weight to localized comments. ARTBA strongly supports this recommendation. Local communities have the most at stake in decisions made under the NEPA process. Whether a project is allowed to proceed or is delayed, it is the local community which will feel the immediate effects of that decision. In the transportation sector, these effects can be the creation of a new road (or the improvement of an existing road) or, if there are delays, years of worsening traffic congestion, which carries with it deterioration of air quality and increased risks of automobile accidents.

In testimony delivered to the Task Force during one of its hearings in Washington, D.C., ARTBA explained how NEPA related litigation initiated against highway projects is often initiated either by interest groups which are not based in the affected community, or by a minority of citizens in the community who do not represent the overall interests of the community as a whole. Also, the outside groups that involve themselves in NEPA litigation are often much more well funded than the local members of the affected community. Indeed, this was the case in both the U.S. 95 litigation in Las Vegas (initiated by the Sierra Club – a nationwide organization) and litigation over the Legacy highway project (where a majority of citizens disapproved of the litigation and wanted the construction of the Legacy project to continue). The current NEPA structure allows these well financed national interest groups to hold local communities hostage to their visions of if and how the development of transportation improvement projects should occur.

By allowing communities which are directly affected by the NEPA process to have greater influence than outside groups, the true intent of the statute will be restored. NEPA has always been a decision making statute, but it was never intended to be a statute by which local communities would have decisions made for them. Those affected most by the NEPA process should have their comments weighted accordingly. This will make for better decisions because the decisions that are reached will represent the interests of those that have the most at stake in the outcome. For the transportation sector, this will mean that state departments of transportation and local transportation officials, who know the particular project and area at issue much better than their federal

counterparts (and certainly more than outside national interests) will be able to ensure that the needs of the local community are met whatever the outcome of the NEPA process.

Recommendation 2.2 – Amend NEPA to codify the EIS page limits set forth in 40 C.F.R. 1502.7. ARTBA strongly supports this position. By setting the length of EISs at a maximum of 300 pages (with a recommended length of 150 pages) delays in the NEPA process will be substantially reduced. As mentioned in response to recommendation 1.2, the current EIS process for a new highway project can take up to seven years if Clean Water Act or Section 4(f) issues are involved. A major reason for this is the length of the EIS itself, which can literally span multiple volumes totaling thousands of pages under the current NEPA regulations.

The EIS is meant as a resource for affected members of the community to gain information about the proposed project. Current EISs are impossible for many lawyers to understand and completely inaccessible to community members without any prior training in the fields of law or environmental consulting. One factor behind lengthy EISs is the fear of litigation on the part of project developers. In an effort to anticipate issues which could be used to delay a project through litigation, project developers have reportedly attempted to "bulletproof" their EISs. This results in a document which attempts to address every possible issue or scenario to arise in connection with a proposed project no matter how relevant it actually is to the surrounding community or how likely it is to be a factor in environmental decision making. The end product of this process is an EIS which is completely unwieldy and does not serve its intended purpose.

Setting sensible limits on the length of EISs will help them better serve the communities for which they are intended to be written. It will also force the authors of EISs to write in clear and more concise terms. Finally, it will reduce the delay associated with new transportation construction projects by dramatically cutting down the time needed to complete the final document.

Recommendation 3.1 – Amend NEPA to grant tribal, state and local stakeholders cooperating agency status. ARTBA does not support this recommendation in its present form. ARTBA supports the increased role of state, local and tribal stakeholders in the NEPA process, but the granting of cooperating agency status to "political subdivisions" could result in delays to the overall NEPA process. If this recommendation is taken, ARTBA suggests that significant clarifications be made before putting it into practice.

First, there would need to be clear definitions as to what "political subdivisions" constituted stakeholders. Would these be solely governmental bodies, or would they include civic organizations and interested local nonprofit groups? Also, the powers which would be conferred upon "cooperating agencies" in the NEPA process would need to be outlined. Would they have the ability to delay the process if they felt their concerns were not being met, or would they serve in more of an advisory capacity?

In order to both reduce delay and maximize the amount of input from state, local and tribal stakeholders in the NEPA process, there should be a defined "lead agency" for every project. Cooperating agencies which would be selected under this recommendation would be able to offer input in the process, but the lead agency should retain control over all final decisions. In the transportation sector, the recently passed "Safe, Accountable, Flexible, Efficient Transportation Equity Act – A Legacy for Users" (SAFETEA-LU) grants "lead agency" status on environmental reviews such as "purpose and need" and "range of alternatives" determinations to the U.S. Department of Transportation (DOT) for new highway projects.

If recommendation 3.1 is to be a part of improving and updating NEPA, the SAFETEA-LU model should be followed. Allow state, local and tribal stakeholders to be awarded enhanced agency status, but allow for a "lead agency" with decision making authority. Further, an improvement upon the model offered in SAFETEA-LU would be to make decisions by the "lead agency" binding upon cooperating agencies once all information has been considered. This will reduce inter-agency conflict which, in turn, will lessen delays in the overall process.

Recommendation 3.2 – Direct CEQ to prepare regulations that allow existing state environmental review processes to satisfy NEPA requirements. ARTBA strongly supports this recommendation. Allowing state environmental review processes to satisfy NEPA requirements will limit duplicative reviews and reduce the amount of delay in the NEPA process. If current information is already available as the result of compliance with state environmental requirements, that information should be usable to satisfy NEPA regulations as well. This increases efficiency and maintains environmental protection.

A more general version of this idea has been proposed by the Bush Administration as part of its executive order to streamline the environmental review process for transportation projects which stated that duplicative reviews and analysis should be eliminated. Duplicative reviews serve no redeeming purpose as part of the NEPA process. Allowing state level environmental reviews to be used at the federal level under NEPA would be an excellent step in applying the spirit of the Bush Administrations executive order concerning transportation projects to the NEPA process as a whole.

Recommendation 4.1 – Amend NEPA to create a citizen suit provision. As ARTBA has stressed in both oral and written testimony before the Task Forces, the area of the NEPA process which would yield the greatest reduction in project delay is frivolous and malicious litigation which subverts the NEPA process. NEPA has been transformed from a vehicle which once helped to mitigate the environmental impacts of development to a tool which enables special interest anti-growth groups to delay needed and environmentally beneficial transportation infrastructure through the use of unending litigation.

This is not to say that all NEPA litigation needs to be curbed, or that NEPA litigation, as a whole, is a hindrance on the process. When used properly, litigation resolves disputes arising from the NEPA process that cannot be dealt with through any other method.

However, when abused, NEPA litigation allows a small minority of individuals to hijack the NEPA process in an attempt to perpetually delay projects simply for the sake of delaying them.

This strategy of "delay for the sake of delay" has been described in numerous outlets by plaintiffs in NEPA litigation. One of the more graphic examples of this mentality is evident in the following 1999 quote from Jay Kardan, Conservation Chairman of the Virginia Chapter of the Sierra Club regarding opposition to highway projects:

> "Facts and reason are much less important than the amount of noise you can make…Officials who support [highway projects] should be mercilessly abused, shamed, ridiculed and otherwise made to suffer pain…The objective should be to cleave a division through the community so painful that people will remember it for decades afterward."

The same mindset was echoed on April 29, 1999 by Roy Kienitz, then executive director of the Surface Transportation Policy Project, during testimony before the U.S. Senate Environment and Public Works Committee:

> "In the struggle between proponents and opponents of a… [highway] project, the best an opponent can hope for is to delay things until the proponents change their minds or tire of the fight."

Also, a "Grassroots Litigation" training manual prepared by the Community Environmental Legal Defense Fund states:

> "In an area devoid of endangered species, impacts to waterways and floodplains, or of federal funding, NEPA may be the only tool that grassroots groups have [to fight highway projects]."

This approach to NEPA litigation undermines the entire process. It advocates using NEPA litigation when no legitimate environmental issues exist to be debated. Instead of allowing communities to make informed decisions, their power is usurped by small groups of well-funded project opponents. Worse yet, these project opponents are often based out of state and not part of the communities they purport to represent.

ARTBA strongly supports the Task Forces' multi-part recommendation in this area and addresses each specific area in turn:

Require appellants to demonstrate that the evaluation was not conducted using the best available information and science. The burden should be on the party seeking to initiate litigation to prove that the best available science and information at the time of the evaluation in question was not used. This will help prevent the NEPA process from being reopened needlessly. EISs, Records of Decision (RODs), and any other aspect of the NEPA process should not be revisited unless there is compelling evidence to do so. Currently, the process can be reopened with the mere addition of information no matter

how relevant it is to the process or how much information was considered when the initial review was being conducted.

This was illustrated in the aforementioned U.S. 95 litigation in Las Vegas, Nevada. There, the project in question had already gone through extensive environmental review and complied with NEPA`s requirements using the best available information at the time. Multiple studies in a variety of areas were considered. However, a single epidemiologic study modeled in Los Angeles, California as opposed to Las Vegas discovered by U.S. 95 project opponents nearly two years after the fact was enough to completely halt construction while litigation was underway. This is unacceptable for a number of reasons. First and foremost, the government had, as part of the NEPA process, reviewed thousands of studies and other voluminous evidence of the environmental effects of the U.S. 95 project. Second, the NEPA process has to have an end point. Transportation planners, project officials, and state and local government need some point of finality in the NEPA process in order to provide enough certainty to allow the project to be planned effectively.

The NEPA process, as illustrated in the U.S. 95 case, is far too easy to "re-open" and cause unnecessary delay to transportation projects. After a project has completed its NEPA requirements, the process should not be re-opened except in extreme circumstances which truly warrant such action. Establishing a requirement that demonstrates that the information used in the initial process was in some way deficient will help to ensure that the project review process in only re-opened when circumstances truly warrant such action.

Clarify that parties must be involved throughout the process in order to have standing in an appeal. Ideally, upon the completion of an EIS there should be nothing to appeal. The NEPA process should be undertaken in a manner which minimizes the possibility for litigation. If an issue is serious enough to warrant litigation, it deserves to be discussed in the public participation portion of an EIS first. The goal of NEPA is to address legitimate environmental concerns within the federal decision making process. The problem that has arisen with the NEPA process is that it has been too often manipulated by project opponents to become a tool of obstruction, rather than the intended coordinating structure for necessary environmental reviews. By requiring issues to be raised during the public participation part of the NEPA process, the chance for them to be resolved within the process increases greatly.

Prohibit a federal agency – or the Department of Justice acting on its behalf – from entering into lawsuit settlement agreements that forbid or severely limit activities for businesses that were not part of the initial lawsuit. Additionally, any lawsuit settlement discussions involving NEPA review between a plaintiff and defendant agency should include the businesses and individuals that are affected by the settlement. ARTBA is supportive of the spirit of this recommendation, but feels that simply involving affected businesses and community members in any settlement discussions would solve the problem and a complete prohibition on the ability of federal agencies (or the Department of Justice) to enter into such settlements isn`t warranted. Prohibiting an agency from

settling a matter in litigation could inadvertently hijack the process (if, for instance, one party decides not to agree with any proposal presented) and cause more delay for everyone involved.

Examples of the need for this type of reform can be found in both the U.S. 95 (Las Vegas) and Legacy Highway litigation. In Las Vegas, the delays caused by litigation imposed damages on the local community which were completely unaddressed in the resulting settlement. Frehner Construction, Inc. (an ARTBA member which provided testimony at the task forces Arizona field hearing) suffered significant disruptions to its business plans and saw the cost of equipment and materials for the project rise by more than $3 million dollars during the time the project was delayed. In Utah, the settlement in the Legacy highway was met with skepticism by members of the affected public who felt that a small, well financed minority of non-local individuals were able to hijack the process and obtain a settlement that didn't reflect the interests of the community. A local grassroots organization, the "Friends of Legacy" vigorously opposed the settlement that was reached despite supporting the overall project because they felt the settlement was tantamount to "blackmail" on the part of outside interests that did not represent the affected community.

ARTBA has long fought for the idea that business and industry should have an equal "seat at the table" in all aspects of NEPA litigation. It was ARTBA that led the fight in the early stages of litigation related to the Legacy Highway project in Utah which helped to establish the legal right of the transportation construction industry to have standing in NEPA litigation. This right should be extended to settlement talks as well. By including all the perspectives of entities that will be effected by the settlement, better solutions will result. Also, the public will have more faith in the process, because their voices will be heard, as opposed to finding out about a settlement only after the fact.

Establish clear guidelines on who has standing to challenge an agency decision. These guidelines should take into account factors such as the challenger's relationship to the proposed federal action, the extent to which the challenger is directly impacted by the action, and whether the challenger was engaged in the NEPA process prior to filing the challenge. ARTBA strongly supports this recommendation, and would urge the task forces to similarly examine who has standing to defend a proposed project from NEPA related litigation. As has been previously mentioned, the current NEPA process allows for litigation initiated by outside groups to hijack project reviews causing either years of delay or, in worst-case scenarios, outright abandonment. Set criteria for standing in NEPA suits would limit litigation to only those parties that had a valid connection to the project in question. Further, by requiring full participation in the NEPA public participation process as a requirement for standing, litigation will only be initiated to solve those issues which could not be solved at any other point in the process. This will eliminate the ability of outside groups to use litigation solely for delay and restrict it to its proper role, which should be to address those issues for which there is no other means of resolution.

The task force should also consider examining who has the right to become involved in defending a project once NEPA litigation is initiated. When the federal government responds to NEPA claims, it is constrained to only addressing the statutory legal points raised by whichever group is challenging a projects. Greater issues such as the project's environmental benefits or the potential effects of project delay on other highway projects and the nation's infrastructure as a whole are not considered, and they need to be. In the U.S. 95 case, the projects environmental and public health benefits would have gone completely unaddressed in appellate litigation had it not been for an amicus brief submitted by ARTBA. Also, ARTBA was the only party to raise the question of what effect delaying the U.S. 95 project would have on the nation's highway system as a whole. Both of these issues can and should have been considered by the main parties in the U.S. 95 litigation, rather than having ARTBA raise them as a non-party. Groups with a direct interest in defending a challenged project should have the right to do so with standing, as parties to the suit, rather than "friends of the court."

Establish a reasonable time period for filing the challenge. Challenges should be allowed to be filed within 180 days of a notice of a final decision on the federal action. ARTBA strongly supports this action. A similar provision was placed in the aforementioned SAFETEA-LU bill, setting a 180-day limitation on lawsuits seeking judicial review of a permit, license or approval issued by a federal agency for a highway or public transportation capital project. A 180 day time limit on NEPA lawsuits will allow for both ample public participation in the decision making process while also allowing important projects to move forward without being subject to environmental lawsuit abuse designed to do nothing other than perpetuate delay.

In the U.S. 95 litigation, claims were filed and construction was stopped four years after the Record of Decision was issued under NEPA for the project. This is simply not acceptable, the NEPA process has to have an end point. Project planners, officials, and state and local government need some point of finality in the NEPA process in order to provide enough certainty to allow their project to be planned effectively. The NEPA process, as illustrated in the U.S. 95 case, is far too easy to "re-open" and cause unnecessary delay to transportation projects. After a project has completed its NEPA requirements, the process should not be re-opened except in extreme circumstances which truly warrant such action. A 180-day limitation on legal challenges will assure that issues which warrant litigation have enough time to be raised while at the same time avoid transforming the NEPA process into an exercise without an end.

Recommendation 4.2 – Amend NEPA to add a requirement that agencies "pre clear" projects. ARTBA has no comment on this recommendation.

Recommendation 5.1 – Amend NEPA to require that "reasonable alternatives" analyzed in NEPA documents be limited to those which are economically and technically feasible. ARTBA strongly supports this recommendation. "Reasonable alternatives" should have guidelines to ensure that they are, indeed, reasonable. Without such guidelines, alternatives can be proposed simply for the sake of delay with no thought as to whether or not there is any realistic possibility of them being enacted.

Many times "alternatives" which are raised as part of the NEPA review process pale in comparison to the proposed project and do not have any effect on the problems the original project was designed to address. Also, "alternatives" which are proposed are often touted by interest groups whose main mission is only to delay the project and are not reflective of the affected community as a whole.

Specific guidelines for "reasonable alternatives" should take into account the cost of the proposed alternative, the actual need or desire for the alternative in the affected community, and the state of technologies involved in developing the alternative. These factors will allow planners to discern which alternatives are actually reasonable and which should not be considered. In the case of highway or road improvement projects, for instance, planners are often forced to consider alternatives such as mass transit or light rail when the area designated for the project is not suited for such measures nor will those measures solve the traffic congestion problems faced by the area in question. This is not to say that these types of alternatives should never be considered, indeed they should be looked at when they are realistic choices. However, planners should not be forced to exhaustively consider a needlessly wide spectrum of measures simply because they are "alternatives" to a given proposal.

Finally, the task force should consider giving authority over the "reasonable alternatives" portion of the NEPA process to the "lead agency" for the project, as described in Recommendation 6.2. The "lead agency" for the project would be best suited to discern which alternatives should be considered and what the consequences of those alternatives from an economic, social and environmental standpoint would be.

Recommendation 5.2 – Amend NEPA to clarify that the alternative analysis must include consideration of the environmental impact of not taking action on any proposed project. ARTBA strongly supports this proposal and provided support for the idea of considering the effects of not going forward with a project in both oral and written testimony at two of the task forces' field hearings. Using the case of the highway widening project in Las Vegas, Nevada as an example, considering the effect of not going forward with the project would mean taking into account the present state of congestion, and the resulting environmental and public health harms caused by its continuation. To put this into perspective, in the case of U.S. 95, residents of Las Vegas are struggling to keep up with a city that has experienced some of the fastest recent population growth anywhere in the United States. Between 1970 and 1996, the Las Vegas population has grown over 300 percent.

The section of U.S. 95 being widened is in one of the most congested areas of Las Vegas, if not the entire country. If nothing is done, U.S. 95 will be operating at 50 to 75 percent above its original design capacity by 2020. An estimated 190,000 vehicles travel through the portion of U.S. 95 to be widened each day, with peak hour traffic reaching as high as 11,900 vehicles. Currently, traffic congestion slows commuters to one-half of the 55 mile per hour speed limit on the corridor. Studies have shown that motor vehicles traveling at speeds under 55 miles per hour produce greater levels of vehicle emissions. As such, not proceeding with the project would lead to dramatically increased motor

emissions, Also, between 2000 and 2002 there were 3,535 motor vehicle crashes on one section of U.S. 95. According to the Texas Transportation Institute's 2005 Urban Mobility Report, in the year 2002 alone, traffic congestion cost Las Vegas area residents and businesses $380 million and resulted in the additional consumption of 14 million gallons of motor fuel. All of these factors should have been considered in the NEPA process as a consequence of not going forward with the U.S. 95 project.

Also, in considering not taking action on a proposed project, the NEPA process should consider the environmental and public health benefits of the project which would be forfeited by not proceeding. For example, in the case of the U.S. 95 project, the following benefits are anticipated upon the project's completion through the year 2025:

- a 58.8 ton reduction in carbon monoxide emissions;
- a 54.3 ton reduction in volatile organic compounds (VOCs);
- an 87.8 ton reduction in carbon dioxide emissions;
- U.S. 95 commuters will use 87.8 percent less motor fuel over 25 years than they would under a "no build" option, which translates to 231,654,731 gallons of motor fuel saved (or 68.9 gallons per commuter);
- Las Vegas U.S. 95 commuters will spend 86 percent less time stuck in traffic – about 30 minutes saved for the twice a day commute through the area to be improved;
- 3,524 fewer total motor vehicle crashes;
- 1,730 fewer injuries to commuters; and most importantly;
- 14 fewer fatalities.

Under existing NEPA requirements, these clear enhancements to the natural environment, health, safety and quality of life of Nevadans are not considered. To ensure a comprehensive NEPA process, the project benefits should be given equal consideration when the environmental impacts are discussed during the EIS process.

Recommendation 5.3 – Direct CEQ to promulgate regulations to make mitigation proposals mandatory. ARTBA opposes this recommendation because it could lead to the loss of flexibility in the planning process and result in unnecessary project delay. Planners should be given the flexibility to adjust the specifics of mitigation proposals as a project evolves, rather than be bound to proposals at the early stages only to find them unworkable later.

If the task force does proceed with this recommendation, any enforcement of mitigation proposals should be done at the state or local level. For example, state and local officials are better suited to balance wetlands issues against the need to move forward with the project development process, as they know which wetlands in a given area are important to the surrounding ecosystem, and which would be candidates for mitigation. This is particularly true with transportation projects, as state and local officials are much better acquainted with the congestion issues being addressed by a particular project, which should be balanced against any mitigation efforts.

Recommendation 6.1 – Direct CEQ to promulgate regulations to encourage more consultation with stakeholders. ARTBA supports this recommendation with the caveat that consultation be "encouraged" as opposed to "required." Consultation throughout the NEPA process will allow for new information and issues to surface faster and be dealt with accordingly. This should reduce the possibility of litigation late in the NEPA process by separating project issues that have merit and need to be addressed from those that are raised only to initiate frivolous litigation designed to interfere with the project development process. However, if this consultation is made mandatory through regulation, it could cause delay for projects where there is no practical reason for parties to have consultation. Thus, any regulatory outgrowth of this recommendation should be flexible enough where parties could chose to forego unnecessary stakeholder consultation.

Recommendation 6.2 – Amend NEPA to Codify CEQ regulation 1501.5 regarding lead agencies. ARTBA strongly supports this recommendation for reasons discussed above in comments on Recommendations 3.1 and 5.1. Having a lead agency with authority over the various elements of the NEPA process will help reduce inter-agency disputes. Designation of a lead agency for transportation construction projects was something that ARTBA fought hard to have included in SAFETEA-LU. Specifically, SAFETEA-LU establishes "lead agency" status for the U.S. DOT on environmental reviews, such as "purpose and need" and "range of alternative" determinations. The "lead agency" defines the "purpose and need" and "alternatives" for the purposes of "any document which the lead agency is responsible for preparing for the project." The approach should be adopted by CEQ with the added requirement that cooperating agencies by required to adopt the findings of the lead agency on these matters. The effectiveness of a lead agency would be greatly diminished if cooperating agencies were free to ignore its findings.

Recommendation 7.1 – Amend NEPA to create a "NEPA Ombudsman" within the Council on Environmental Quality. In both oral and written testimony before the task forces, ARTBA advocated the increased use of alternative dispute resolution methods such as this within the NEPA process. The availability of a NEPA ombudsman would allow for problems to be resolved before reaching litigation. If this recommendation is carried out, ARTBA suggests that the authority of the NEPA ombudsman be clearly explained and that NEPA related conflicts be required to go through the ombudsman before going to litigation. This would ensure that litigation be used as a last resort, rather than a first step in the NEPA process.

Recommendation 7.2 – Direct CEQ to control NEPA related costs. ARTBA notes that if many of the other recommendations in this draft report are enacted overall NEPA costs should decrease. Measures such as coordination of agency reviews and allowing the utilization of preexisting data from state agencies to fulfill NEPA requirements will cut down the amount of resources required by the NEPA process. Also, any reduction in the amount of NEPA litigation will result in a reduction of NEPA related costs. Often costs are inflated in the EIS or EA stages because of "over-compliance" resulting from a

fear of potential litigation. The page limits on EISs and EAs recommended in this draft report would help alleviate this problem.

Recommendation 8.1 – Amend NEPA to clarify how agencies would evaluate the effect of past actions for assessing cumulative impact. ARTBA has no comment on this recommendation other than to ask that any clarifications in this area be done with an eye towards reducing delay in the overall process.

Recommendation 8.2 – Direct CEQ to promulgate regulations to make clear which types of future actions are appropriate for consideration under the cumulative impact analysis. ARTBA supports this recommendation. Clarification will allow project planners to know when cumulative impacts analyses are actually needed as opposed to having to engage in such an analysis out of the fear of future litigation. Clarification of NEPA guidelines is essential to improving the process and eliminating delay as a result of duplicative or unnecessary reviews. If a cumulative impacts analysis is not necessary for a particular project, it should not be undertaken.

Recommendation 9.1 – CEQ study of NEPA's interaction with other environmental laws. ARTBA strongly supports this recommendation. When NEPA was enacted in 1969, many of the environmental laws of today simply did not exist. Since NEPA went into effect, the following statutes have been enacted into law:

- the Clean Air Act (CAA)
- the Clean Water Act (CWA)
- the Endangered Species Act (ESA)
- the Federal Land Policy and Management Act (FLPMA)
- the Resources Conservation and Recovery Act (RCRA)
- the Toxic Substances Control Act (TSCA)
- the Surface Mining Control and Reclamation Act (SMCRA)
- the Archaeological Resources Protection Act (ARPA)
- the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)

Also, many of the acts above have been amended multiple times since NEPA's creation to address issues that have arisen since their inception. NEPA should not be treated any differently. When NEPA was created, there was little, if any, environmental regulation. Now, multiple aspects of the environmental arena are regulated by specific statutes. To the extent that NEPA duplicates these efforts it is not providing any greater amount of environmental protection, but rather it is facilitating both delay and waste. A study of NEPA's interaction with other federal environmental laws will be extremely informative and provide a solid basis for implementing many of the recommendations outlined in this draft report.

Recommendation 9.2 – CEQ study of current federal agency NEPA staffing issues. ARTBA supports this recommendation. To the extent that improving agency staffing

issues would reduce delay in the NEPA review process, this would be a welcome idea. It should be noted that a reduction in the amount of overall duplication in the NEPA process which would be achieved by other recommendations in this draft report would affect the amount of staff that agencies have to dedicate to NEPA. Also, staffing issues should be addressed to the extent that they will allow agencies to enforce mandatory timelines for NEPA documents as set forth in recommendation 1.2.

Recommendation 9.3 – CEQ study of NEPA's interaction with state "mini-NEPAs" and similar laws. ARTBA supports this recommendation for the reasons we support recommendation 9.1. By studying NEPA's interaction with its state counterparts, CEQ will be able to ascertain where data used to meet state requirements can also be used at the federal level (and vice-versa). This will identify opportunities where delays in the NEPA process can be reduced.

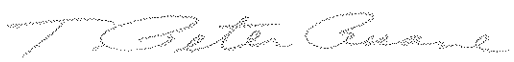
Conclusion

The NEPA process is in need of fine-tuning. For over a decade, reform to the environmental review process has been a top ARTBA priority. Indeed, ARTBA is extremely appreciative of the formation of these task forces and their goal of taking a hard look at NEPA and its effects on local environments and economies.

The goal of these efforts is not—as some have suggested—to undermine the environmental review process. Rather, it is to coordinate the process in order to more effectively deal with the transportation needs and congestion issues facing the nation. If handled appropriately, improving the delivery of transportation projects would increase the efficiency of the transportation network, and ensure the traveling public receives the full benefit of the user fee-financed transportation system. We are not seeking changes that are outcome determinative; we are seeking process improvements that would generate quality decisions in a more timely manner.

Once again, ARTBA thanks you not only for the opportunity to comment on this draft report, but also for the establishment and work of these task forces. ARTBA looks forward to continuing to work with the task forces in their efforts to improve and update the NEPA process.

Sincerely,



T. Peter Ruane
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